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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Arizona Conference of Police and Sheriffs,
Inc., an Arizona non-profit corporation;
Dawn Barkman; and Joseph Murphy
on their own behalf and on behalf
of all others similarly situated
Plaintiffs,
v.
Pima County,
Defendant.

Case No.:

**PLAINTIFFS' APPLICATION FOR
PRELIMINARY INJUNCTION**

Plaintiffs, through undersigned counsel, respectfully moves that this Court issue a preliminary injunction staying the vaccine surcharge of \$45.51 per pay period on health insurance premiums for unvaccinated employees. In doing so, Pima County violated its obligations under the Health Insurance Portability and Accountability Act (HIPAA) of 1996 which addresses penalties and incentives in employee wellness programs. Since this vaccine surcharge became effective on November 1, 2021, Plaintiffs (and those similarly situated) pay a \$45.41 surcharge every pay period. As it stands, the Plaintiffs (and those similarly situated) will face a choice—either continue to pay every pay period or become vaccinated, despite personal or medical concerns, because they simply cannot afford to wait until this Court deems the surcharge unlawful.

Unless the Court temporarily enjoins Pima County's health insurance premium surcharge, Plaintiffs (and those similarly situated) will continue paying higher insurance

1 premiums when consumers are already facing rising inflation. These financial harms will
2 continue to accrue without a remedy until this litigation is resolved. Every pay period, the
3 Plaintiffs (and those similarly situated) will lose \$45.51 as a result of this unlawful
4 surcharge. This is a substantial amount for those living paycheck-to-paycheck. To be clear:
5 Plaintiffs take no position on vaccines or vaccine mandates. Plaintiffs merely ask the Court
6 to require Pima County to follow federal law. As one District Court in Georgia recently
7 noted:

8 “[t]his case is not about whether vaccines are effective. They are.” *Kentucky*
9 *v. Biden*, No. 3:21-cv-55, 2021 WL 5587446, at *9 (E.D. Ky. Nov. 30, 2021).
10 Moreover, the Court acknowledges the tragic toll that the COVID-19
11 pandemic has wrought throughout the nation and the globe. However, even
12 in times of crisis this Court must preserve the rule of law and ensure that all
13 branches of government act within the bounds of their constitutionally
14 granted authorities. Indeed, the United States Supreme Court has recognized
15 that, while the public indisputably “has a strong interest in combating the
spread of [COVID-19],” that interest does not permit the government to “act
unlawfully even in pursuit of desirable ends.” *Ala. Ass’n of Realtors v. HHS*,
141 S. Ct. 2485, 2490 (2021) (*citing Youngstown Sheet & Tube Co. v.*
Sawyer, 343 U.S. 579, 582, 585-86 (1952)).

16 *Georgia v. Biden*, No. 1:21-cv-00163-RSB-BKE, 2021 U.S. Dist. LEXIS 234032 at *2
17 (S.D. Ga. Dec. 7, 2021).

18 Facing the risk of additional lost income, many Pima County employees may opt to
19 receive the vaccine, despite their personal beliefs or health concerns, simply because they
20 cannot otherwise afford to pay higher health insurance. And for those that are unable or
21 unwilling to become vaccinated because of personal beliefs or health concerns, those
22 employees may also suffer other significant harms that monetary damages cannot remedy
23 including, but not limited to, inability to pay other obligations (such as a mortgage or car
24 insurance), the inability to pay for life-saving medical care, and the disruption of support
25 for dependents who need it. For these Plaintiffs (and those similarly situated) time is of the
26 essence—they cannot afford to wait, and continue to pay, while litigation is pending.

27 This Court should exercise its equitable jurisdiction to temporarily enjoin Pima
28 County’s surcharge on health insurance premiums for unvaccinated employees “to

1 preserve the court’s ability to later order meaningful relief.” Fed. R. Civ. P. 65; *Sierra On-*
2 *Line, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415, 1422 (9th Cir.1984); *Gon v. First State*
3 *Ins. Co.*, 871 F.2d 863 (9th Cir.1989).

4 **I. STANDARD OF REVIEW**

5 To obtain a temporary restraining order or preliminary injunction, Plaintiffs must
6 establish: 1) they are likely to succeed on the merits; 2) they are likely to suffer irreparable
7 harm in the absence of preliminary relief; 3) that the balance of equities tips in their favor;
8 and 4) that an injunction is in the public interest. *Stormans, Inc. v. Selecky*, 586 F.3d 1109,
9 1127 (9th Cir. 2009). “[S]erious questions going to the merits and a balance of hardships
10 that tips sharply towards the plaintiff can support issuance of a preliminary injunction, so
11 long as the plaintiff also shows that there is a likelihood of irreparable injury and that the
12 injunction is in the public interest.” *Alliance for Wild Rockies v. Cottrell*, 632 F.3d 1127,
13 1131-32 (9th Cir. 2011) (internal quotation marks omitted). When the government is a
14 party, the last two factors merge. *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092
15 (9th Cir. 2014).

16 Courts also apply an alternative “sliding scale” or “serious questions”
17 approach where “the elements of the preliminary injunction test are balanced, so that a
18 stronger showing of one element may offset a weaker showing of another.” *Alliance for*
19 *the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011). “To reach this sliding
20 scale analysis, however, a moving party must, at an ‘irreducible minimum,’ demonstrate
21 some chance of success on the merits.” *Global Horizons, Inc. v. United States DOL*, 510
22 F.3d 1054, 1058 (9th Cir. 2007) (citing *Arcamuzi v. Cont’l Air Lines, Inc.*, 819 F.2d 935,
23 937 (9th Cir. 1987)). As discussed below, under either analytical framework, Plaintiffs are
24 entitled to a preliminary injunction in this case.

25 **II. ARGUMENT**

26 **A. Plaintiffs are Likely to Succeed on the Merits**

27 Likelihood of success on the merits is “the most important” factor. As discussed
28 below, Plaintiffs are likely to succeed on the merits because Pima County is violating
federal law.

1 The Patient Protection and Affordable Care Act (ACA) was adopted by Congress
2 and signed into law in 2010. Among other effects, the ACA amended the Health Insurance
3 Portability and Accountability Act (HIPAA) of 1996. Wellness programs are regulated in
4 part by HIPAA, as amended by the ACA, as well as by HIPAA's implementing regulations.
5 The ACA also codified prior agency guidance on wellness programs and expanded the
6 scope of permissible incentives under such programs.

7 Generally, federal law prohibits group health plans from charging similarly situated
8 individuals different premiums or contributions or imposing different deductibles,
9 copayment or other cost sharing requirements based on a "health status-related factor."
10 However, entities providing health insurance may offer "premium discounts or rebates" on
11 a plan participant's copayments or deductibles in return for that individual's compliance
12 with a wellness program as follows:

13 A group health plan, and a health insurance issuer offering health insurance
14 coverage in connection with a group health plan, may not require any
15 individual (as a condition of enrollment or continued enrollment under the
16 plan) to pay a premium or contribution which is greater than such premium
17 or contribution for a similarly situated individual enrolled in the plan on the
18 basis of any health status-related factor in relation to the individual or to an
19 individual enrolled under the plan as a dependent of the individual.

20 29 U.S.C. § 1182(b)(1); *see also* 26 U.S.C. § 9802(b)(1); 42 U.S.C. § 300gg-4(b)(1).

21 A "health status-related factor," also referred to as a health factor (Health Factor),
22 is defined as:

- 23 A. Health Status
- 24 B. Medical condition (including both physical and mental illnesses).
- 25 C. Claims experience.
- 26 D. Receipt of health care.
- 27 E. Medical history.
- 28 F. Genetic information.
- G. Evidence of insurability (including conditions arising out of acts of domestic violence).
- H. Disability

29 U.S.C. § 1182(a)(1).

1 Vaccinations are a Health Factor because the individual being vaccinated receives
2 health care (the vaccine) which inherently and irrevocably results in a health-related
3 standard (being vaccinated.). Federal law also allows employers offering a group health
4 insurance coverage to establish premium discounts or rebates, or to modify otherwise
5 applicable copayments or deductibles, in return for adherence to programs of health
6 promotion and disease prevention. 29 U.S.C. § 1182(b)(2)(B); *see also* 26 U.S.C. §
7 9802(b)(2)(B); 42 U.S.C. § 300gg-4(b)(2)(B). Such a reward or incentive may include a
8 discount on insurance costs or a penalty that increases the plan participant's costs because
9 of non-participation in the wellness program. See 26 C.F.R. § 54.9802-1(f)(1)(i).

10 Wellness programs are either "health-contingent" or "participatory." 29 C.F.R. §
11 2590.702(f). Federal law allows health plans and insurers to offer incentives of up to 30%
12 of the cost of coverage in exchange for an employee's participation in a health-contingent
13 wellness program. A health-contingent wellness program is where the reward is based on
14 an insured individual's satisfaction of a particular health-related factor. If none of the
15 conditions for obtaining a reward under a wellness program is based on a person satisfying
16 a health-related standard (or if a wellness program does not provide a reward), the program
17 is considered "participatory." 29 C.F.R. § 2590.702(f)(1)(ii). On the other hand, a wellness
18 program that requires individuals "to satisfy a standard related to a health factor to obtain
19 a reward (or... undertake more than a similarly situated individual based on a health factor
20 in order to obtain the same reward)" is a "health-contingent" program. 29 C.F.R. §
21 2590.702(f)(1)(iii). Health-contingent programs have five requirements.:

- 22 a) The employee must be given the opportunity to qualify for the reward at
23 least once per year;
- 24 b) The 'reward' cannot generally exceed 30% of the cost of the employee
25 coverage under the plan;
- 26 c) The program must be reasonably designed to promote health or prevent
27 disease;
- 28 d) The reward must be available to all similarly situated individuals, which
 means employers must provide a reasonable alternative standard or waive
 the standard upon an employee's request; and

1 e) The employer must disclose the availability of the possibility of the
2 reasonable alternative standard or waiver in all materials describing the
3 terms of the wellness program.

4 29 C.F.R. § 2590.702(f)(3)–(4)

5 Health-contingent programs can be either activity-only or outcome-based. 29 C.F.R.
6 § 2590.702(f)(1)(iii). Activity-only programs simply require that individuals engage in a
7 health-related activity, such as an exercise program. 29 C.F.R. § 2590.702(f)(1)(iv)–(v).
8 An activity-only wellness program requires an individual to perform or complete an
9 activity related to a health factor in order to obtain a reward but does not require the
10 individual to attain or maintain a specific health outcome. 29 C.F.R. § 2590.702(f)(1)(iv).
11 In activity-only wellness programs, the reasonable alternative standard must be available
12 to individuals who have a medical condition that makes it unreasonably difficult to satisfy
13 the applicable standard. *Id* at § 54.9802-1(f)(3)(iv).

14 Outcome-based, health-contingent programs require that individuals maintain a
15 certain health standard, such as receiving certain test results or being tobacco free. 29
16 C.F.R. § 2590.702(f)(1)(iv)–(v). Importantly, for outcome-based wellness programs, the
17 reasonable alternative standard must be available to any individual who does not meet the
18 initial standard based on the measurement, test, or screening. *Id* § 54.9802-1(f)(4)(iv).

19 Finally, the Equal Employment Opportunity Commission (EEOC) has determined
20 that employers are permitted to offer employee incentives for voluntarily receiving a
21 vaccination. See [https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-](https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws#K.15)
22 [ada-rehabilitation-act-and-other-eeo-laws#K.15](https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws#K.15) An incentive includes both rewards and
23 penalties. However, the incentive cannot be “so substantial as to be coercive.” *Id*.

24 On August 16, 2021, Pima County Administrator Charles “Chuck” Huckleberry
25 issued a memorandum to the Board of Supervisors entitled “COVID-19 Vaccination
26 Incentives and Disincentives.” That memorandum listed, as one of three disincentives:

27 Developing a separate health insurance medical premium for unvaccinated
28 employees due to medical expense risk related to contracting COVID-19. An
additional \$25.51 remaining surcharge can be applied to all tier levels
(employee only, employee plus spouse, employee plus children, and
employee plus family) or \$663.26 annually.

1 The same memorandum also acknowledged that disincentives two and three:

2 are regulated by the . . . ACA which permits employers to offer up to 30
3 percent of the cost of health plan coverage as an incentive to participate in a
4 wellness program (or surcharge.) An employer may offer up to 30 percent of
5 the total cost of self-only health plan coverage to an employee as an incentive
6 (surcharge) to participate in a wellness program. If the employer offers more
7 than one plan, the 30 percent applies to the lowest cost plan. Here, the total
8 amount that can be applied to a surcharge for any employee is \$60.51 per pay
9 period (\$35.00 + \$25.51) or \$1,573.26 annually.

10 Finally, the August 16 Memo recommended the Board “adopt incentives for vaccinated
11 employees and disincentives for unvaccinated employees” to consist of:

12 a) a one-time \$300 COVID-19 Health Incentive for all employees fully
13 vaccinated by October 1, 2021; and

14 b) A financial disincentive for unvaccinated employees effective October 1,
15 2021 that eliminates all health insurance premium discounts (\$35 per pay
16 period) and add a 30 percent base plan surcharge of \$25.51 per pay period
17 for a total disincentive amount of \$60.51 per pay period or \$1,573.26 per
18 year. Unvaccinated employees with a valid medical or religious exemption
19 would not be subject to the surcharge.

20 At its meeting on September 7, 2021, the Board of Supervisors continued its
21 discussion of the “vaccine disincentives” agenda item. During debate, “Supervisor [Steve]
22 Christy reiterated his concern regarding liability issues that could arise from imposing
23 disincentives on employees. He stated that the County and the County Administration were
24 instituting a hostile work environment by financially penalizing unvaccinated employees.
25 He added that lawsuits could be more-costly than the alleged increases to the health care
26 program.” On September 7, 2021, by a 4-1 vote, the Board approved the vaccine
27 disincentives presented by the County Administrator.

28 On September 20, 2021, the County Administrator issued a memorandum
“Amending the Proposed Vaccine Disincentive in Order to Preserve the Health Insurance
Premium Discount (Wellness) Program.” The first paragraph of that memorandum
indicates, in part:

After additional consideration, I am recommending that we maintain the
health insurance premium discounts for unvaccinated employees. These

1 discounts were earned by the employee in recognition of the employee's
2 adherence to several key elements of a healthy lifestyle. If, for example, an
3 employee is and remains tobacco free he or she earns \$20 per pay period.
4 While we must encourage employees to become vaccinated, to penalize a
5 nonsmoker for not being vaccinated could inadvertently negate the
6 importance of not smoking. The same principle is true for the variety of
7 health lifestyle incentives.

8 *****

9 I am recommending . . . that we amend the disincentives to include only a
10 separate health insurance medical premium for unvaccinated employees due
11 to the increased medical expense risk related to contracting COVID-19. As
12 a result, the full amount of the financial disincentive previously approved of
13 \$60.51 per pay period or \$1,573.26 per year cannot be assessed if we are to
14 remain compliant with the [ACA] as defined by the [EEOC].

15 To accomplish the goal of creating the disincentive, and remain a legally-compliant
16 health-contingent, outcome-based wellness program, the County Administrator needed to
17 amend the County's wellness programs and Plan premiums as follows:

18 Instead, I propose we shift costs within our current wellness incentive
19 program. As a group health plan wellness program, we are permitted to tie
20 incentives to tobacco use status that can amount to 50% of the total cost of
21 coverage applied to the lowest cost plan (\$201.71). The 50% (\$100.86)
22 includes the wellness incentive program which cannot exceed 30% (\$60.51)
23 of the lowest cost plan. By including the tobacco use status in the 50%
24 category instead of the 30% category, this results in an allowable \$45.51 per
25 pay period cost that can be assessed as a vaccine surcharge. Because there
26 are no current federal rules concerning a vaccine surcharge, that cost must be
27 included in the 30% attributed to the wellness incentive program.

28 I propose to keep the health insurance premium discounts in place and that
we assess a \$45.51 per pay period (\$1,183.26 annually) vaccine surcharge
for all unvaccinated employees who are on our insurance plan effective
November, 2021. (Emphasis in original.)

At the Board of Supervisors' September 21, 2021, meeting, it adopted the proposed
change in the disincentive package from his September 20 Memo. Put another way, the
Board voted to place a surcharge of \$45.51 per pay period on unvaccinated employees who

1 receive County medical insurance. The vaccine surcharge does not apply to unvaccinated
2 employees who have a County-approved religious or medical exemption.

3 On October 22, 2021, at the request of Supervisor Christy, the County Administrator
4 issued a memorandum outlining costs incurred by the Plan, including total claims for Fiscal
5 Year 2020/21, and additional costs incurred due to COVID-19. The County Administrator
6 also noted that the number of employees who will be “paying the surcharge of \$45.01 and
7 per pay period” was unknown. The County’s vaccine surcharge became effective
8 November 1, 2021.

9 The vaccine surcharge establishes that Pima County’s wellness program is a health-
10 contingent, outcome-based program. Employees only avoid the surcharge when they are
11 vaccinated against COVID-19 (or if they receive a religious or medical accommodation.)
12 In other words, its wellness requires employees to satisfy a standard related to a health
13 factor (being vaccinated) to avoid the disincentive (the surcharge.) All health-contingent,
14 outcome-based wellness programs must make any reward available to all similarly situated
15 individuals, which means that employers must provide a reasonable alternative standard or
16 waive the standard upon an employee’s request.

17 Pima County’s health-contingent, outcome-based wellness program violates federal
18 law because it has failed to make a reasonable alternative standard available to
19 unvaccinated employees. For example, Pima County’s wellness program imposes a health
20 insurance surcharge on tobacco users. However, tobacco users are entitled to the
21 opportunity to avoid the surcharge by engaging in a reasonable alternative standard - such
22 as education or smoking cessation programs - *even if they never stop using tobacco*. Pima
23 County, however, does not offer a reasonable alternative standard to being vaccinated, even
24 if the employee is never vaccinated. Federal law also requires employers to give its
25 employees the opportunity to qualify for the wellness program reward annually. Pima
26 Count has never, however, articulated how long its vaccine surcharge will remain in effect.
27 Finally, Pima County’s vaccine surcharge is also clearly designed to be coercive. As
28 discussed above, this also violates the EEOC’s guidance on wellness program incentives

1 and disincentives. For these reasons, Plaintiffs are likely to succeed on the merits of their
2 claims.

3 **B. Plaintiffs' Irreparable Injury**

4 A plaintiff seeking preliminary relief must “demonstrate that irreparable injury is
5 likely in the absence of an injunction.” *Winter v. NRDC*, 555 U.S. 7, 22 (2008) (emphasis
6 omitted). The analysis focuses on irreparability, “irrespective of the magnitude of the
7 injury.” *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 725 (9th Cir. 1999). The threat to the
8 economic interests of those whom the surcharge is imposed is not some amorphous
9 concept. Given that the surcharge was imposed beginning November 1, 2021, this is a live
10 issue for many Pima County employees, not based on speculative harm. *See Winter v. Nat.*
11 *Res. Def. Council, Inc.*, 555 U.S. 7, 20, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008)
12 (“[A] preliminary injunction will not be issued simply to prevent the possibility of some
13 remote future injury”) (internal citation omitted).

14 Preliminary injunctive relief is also imperative. Without such relief, Plaintiffs (and
15 those similarly situated) face an impossible choice - one for which this Court will have no
16 remedy. While irreparable harm may be difficult to define, it is often marked by an inability
17 to be adequately remedied by money damages. *See Optinrealbig.com, LLC v. Ironport*
18 *Sys., Inc.*, 323 F. Supp. 2d 1037, 1050 (N.D. Cal. 2004) (citation omitted). Here, Pima
19 County employees must decide whether to receive the COVID-19 vaccine or continue
20 paying higher insurance premiums without a reasonable alternative standard as required by
21 law. It is understandable that Pima County employees may be considering acquiescing to
22 Pima County’s coercion – thereby risking their conscience and personal beliefs - in favor
23 of financial stability. Pima County employees should not be forced into forsaking their
24 sincere beliefs simply because Pima County has not followed federal law. The damage,
25 absent an injunction will be not only significant, but permanent for those who choose to
26 get vaccinated solely because they cannot afford the surcharge. In other words, for those
27 who become vaccinated only because they cannot afford the alternative, there is no
28 available retroactive remedy. As such, the detrimental consequences of not issuing the
injunction cannot be overstated because the harm is irreparable.

1 **C. Balancing the Equities Clearly Favors Plaintiffs**

2 As the Pima County government is a party, courts consider the balance of equities
3 and the public interest together. *Jewell*, 747 F.3d at 1092. It is well-established that
4 balancing the equities is not an exact science. *See Youngstown Sheet & Tube Co. v. Sawyer*,
5 343 U.S. 579, 609, 72 S. Ct. 863, 96 L. Ed. 1153, 62 Ohio Law Abs. 417 (1952)
6 (Frankfurter, J., concurring) (“Balancing the equities . . . is lawyers’ jargon for choosing
7 between conflicting public interests”). Here, however, there is no such conundrum.

8 Plaintiffs have demonstrated the irreparable injury is imminent absent an injunction.
9 Defendant’s interest lies in implementing measures which protect the health and wellness
10 of both the general community and Pima County employees. But it must do so in
11 congruence with the law. Pima County is clearly allowed to use its wellness programs for
12 disincentive programs *as long as* it concurrently implements a reasonable alternative
13 standard to the required health factor. Defendant’s obligation to implement a reasonable
14 alternative standard to being vaccinated (in order to avoid the health insurance surcharge)
15 is hardly onerous. For example, Pima County could reasonably mandate that unvaccinated
16 employees take regular COVID-19 tests and wear a mask. This would be consistent with
17 the Occupational Safety and Health Administration’s recent Emergency Temporary
18 Standard (ETS).¹ In fact, Pima County already provides this alternative standard to those
19 who are unvaccinated and have received a religious or medical accommodation. Therefore,
20 because the burden of the harm to Defendant is less severe than the likely harm to Plaintiffs,
21 the equities unequivocally favor Plaintiffs.

22 **III. CONCLUSION**

23 Plaintiffs have demonstrated that a preliminary injunction is warranted. “The
24 purpose of such interim equitable relief is not to conclusively determine the rights of the
25 parties but to balance the equities as the litigation moves forward.” *Trump v. Int’l Refugee*

26 ¹ *See* COVID-19 Vaccination and Testing; Emergency Temporary Standard, 86 Fed. Reg.
27 61,402 (Nov. 5, 2021) (to be codified at 29 C.F.R. pts. 1910, 1915, 1917, 1918, 1926, and
28 1928)

1 *Assistance Project*, 137 S. Ct. 2080, 2087, 198 L. Ed. 2d 643 (2017). Plaintiffs Barkman
2 and Murphy and those similarly situated, including other members of AZCOPS and other
3 unvaccinated Pima County employees, will be irreparably harmed if Defendant's unlawful
4 rule is allowed to stand because of the financial burden of paying more for health insurance
5 without a reasonable alternative standard. In addition, Plaintiffs are likely to succeed on
6 the merits of the claims. Finally, staying the vaccine surcharge will preserve the pre-
7 disincentive status quo, which is in the public interest and does not harm the government's
8 interest, and for the same reason, the balance of equities weighs in Plaintiffs' favor. For
9 these reasons, the Court should issue a preliminary injunction staying Pima County's
10 vaccine surcharge on health insurance premiums for unvaccinated employees who have
11 not sought and who do not qualify for a religious accommodation or medical exemption.

12 Respectfully submitted this 9th day of December, 2021.

13 **JACOBSON LAW FIRM**

14
15 s/ Jeffrey H. Jacobson
16 JEFFREY H. JACOBSON

17 s/ Alexis B. Sharpe
18 ALEXIS B. SHARPE
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20 Filed via the CM/ECF system this 9th day of December, 2021
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